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Supreme Court, U.S.
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IN THE SUPREME COURT

OF THE UNITED STATES

October Term 1992

No.

WILLIAM J. CLEARY, JR.,

Petitioner,

v.

ROBERT WASSERWALD, INC., and
ROBERT WASSERWALD, INDIVIDUALLY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO REVIEW AN OPINION OF THE COURT OF APPEAL
SECOND APPELLATE DISTRICT,
DIVISION TWO,
STATE OF CALIFORNIA

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QUESTIONS PRESENTED FOR REVIEW

1.) Where the I.R.S. determines that an independent contractor is in fact an employee, does the employee have a cause of action for indemnity against the employer for his share of the F.I.C.A. tax otherwise assessed against the employee as a self-employment tax? Can the employee compel the employer to pay to the I.R.S. the employer share of the F.I.C.A.?

2.) Does the Americans with Disabilities Act (42 U.S.C. Section 12101, et seq.) apply to state court actions pending on its effective date where the action's gist alleges a violation of the Act?

3.) Where under state tort law a cause of action for wrongful termination and breach of the implied covenant of good faith and fair dealing may be asserted when there a breach of public policy, must not

the state court consider the policy embodied in the Americans with Disabilities Act in deciding whether there was a breach of public policy?

4.) Where state statutes require the employer to provide the employee with unemployment insurance, state disability insurance and worker's compensation insurance, do not the Due Process and Equal Protection clauses of the Fourteenth Amendment require state courts to recognize a cause of action for damages against the employer for his violation of the statutory obligations?

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OPINIONS BELOW

(R. 14.1(d)

The opinion of the Court of Appeal is not officially reported but it is reproduced in the Appendix at page 1. The California Supreme Court denied review on April 14, 1993 without further opinion. (Append. p.20).

JURISDICTION

Jurisdiction of this court is based on 28 U.S.C. Section 1257 which permits petitions to this court where "any title, right, privilege or immunity is specially set up or claimed under the Constitution...or statutes of...the United States."

The complaint here sought recovery

of taxes made the personal liability of the employer by I.R.C Sections 3101, 3111, and 6672. In fact, while the case was pending, the I.R.S. determined by letter of July 23, 1992 that petitioner was respondent's employee for federal tax purposes. (Append. p. 21). The complaint was nonetheless dismissed, which was affirmed by the Court of Appeal on January 29, 1993. A petition for review to the state Supreme Court was denied on April 14, 1993.

Jurisdiction over the remaining questions is claimed under 28 U.S.C. Section 2106. (Vance v. Terrazas 444 U.S. 252, 258-259, N.5 (1980) which grants the court jurisdiction over issues not raised below where some federal question is specifically raised.) Jurisdiction is also claimed under the Plain Error Rule of this Court. (R.24.1(a).)

Jurisdiction, furthermore, is claimed under the Americans with

Disabilities Act, effective July 26, 1992, which pre-empted state law under which the Court of Appeal rendered the decision on January 29, 1993. (See, 29 C.F.R. Section 1603.1(c)(2). Hence, the Court of Appeal was without subject matter jurisdiction to decide the case under state law. The Supremacy Clause of Article VI states that federal law binds state court judges. As the self-executing provision of the Judicial Power Clause vests this court with jurisdiction to review all cases arising under Federal Law, jurisdiction is, then, claimed under Article III, Sections 1 and 2.

Constitutions, Statutes and Regulations

The following texts are summarized here. They are set out verbatim in the Appendix. (Append. pp 35-49)

1.) I.R.C. Section 3101 imposes a retirement and disability tax on the wages of all employees. This is an income tax, known as FICA.

2.) I.R.C. Section 3102 requires the employer to collect the employees' FICA tax by withholding it from wages paid.

3.) I.R.C. Section 3111 imposes an excise tax on the employer equal to the amount paid by the employee for retirement and disability under Section 3101. This is also part of the F.I.C.A. tax.

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4.) I.R.C. Section 3402 requires the employer to deduct and withhold the employee's income tax.

5.) I.R.C. Section 6672 provides that the employer shall be 100% liable for any tax he should but does not withhold.

6.) The Americans with Disabilities Act (ADA) (42 U.S.C. 12101 et seq.) provides that employers cannot discriminate against qualified disabled employees in promotion or discharge, or other "terms, conditions, and privileges of employment." (42 U.S.C. 12112(a))

7.) 29 C.F.R. Section 1630.1 et seq. provides that the ADA pre-empts state tort law to the extent that it does not provide remedies equal to or greater than the ADA.

8.) The ADA was enacted on July 26, 1990, effective July 26, 1992. (Statutory note, 42 U.S.C. Section 12111.) But certain sections took effect immediately upon passage, such as 42 U.S.C. Sections 12116, 12117, effective date to the contrary notwithstanding.

9.) California Labor Code Sections 3706, 3708 provide that an employee shall have an action at law against the employer when the employer does not provide worker's compensation insurance for the employee. In such an action, the employer's negligence is presumed, and the bars of contributory negligence and assumption of risk are unavailable.

10.) The Supremacy Clause provides that federal law shall bind state court judges.

11.) The Fourteenth Amendment provides that no state shall deprive any person of Due Process of law or of its Equal Protection.

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Statement Of The Case

I.

Petitioner Cleary sued respondent Wasserwald for indemnity for income taxes the I.R.S. retroactively assessed Cleary. Cleary, a lawyer, had worked for Wasserwald's law firm for about 7 years before being terminated. The action, brought in the California Superior Court, alleged that the I.R.S. had filed a lien for taxes it retroactively assessed Cleary based on his self-employment as an independent contractor for Wasserwald. Cleary alleged that he was an employee of Wasserwald's, not an independent contractor, and that Wasserwald should indemnify Cleary for the self-employment tax, an amount equal to the employer share of the F.I.C.A. excise tax that Wasserwald should have paid in the first place. The complaint also alleged that the lien had impaired Cleary's credit so that he could not open credit accounts, a

fact documented in the trial court, and for which damages were sought.

The trial court, after several demurrers, dismissed the complaint, and the Court of Appeal affirmed. While the appeal was pending, however, the I.R.S. in a letter determination decided in Cleary's favor, concluding in fact Cleary was an employee, not an independent contractor, for purposes of the Federal Insurance Contribution Act, the Federal Unemployment Tax Act, and for Collection of Income Tax at Source of Wages. (Append.p. 6.) Yet the Court of Appeal held that Cleary "acquiesced" in Wasserwald's misclassification and denied the count for indemnity and for damages as well.[2] In finally disposing of this count, the state court distinguished Bloom v. U.S.,

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[2] I.R.C. Section 3102(b) provides for employer indemnification where the F.I.C.A. excise tax is paid. There is no similar provision for employee indemnification where the employer does not pay the tax.

272 F.2d 215 (9 Cir. 1959), widely cited for the proposition that an employer is personally liable for 100% of his employee's federal taxes, on the ground that in Bloom the taxes had been withheld whereas here they had not been. That is, the court holds the employer liable for taxes he withholds, but not for taxes he should withhold but does not! That a compound violation of the tax law is preferred to a single, component violation is the court's inescapable conclusion. But see, I.R.C. Section 6672(a) which makes the employer 100% liable for taxes he should withhold but does not. And see I.R.C. Section 3102(a) which directs the employer to withhold the employee's share of the FICA tax. The rubbing point is still that the employer has unfairly shifted his tax liability (I.R.C. Section 3111(a) - an excise tax, for which the employee could not be liable) onto the employee's shoulders in the form of a transmuted income tax. So,

the Court of Appeal's opinion essentially holds that acquiescence in the employer's failure to pay his excise tax renders the employee liable for it as an self-employment tax. (The rates are identical, 7.5%.) The argument fails because the syllogism contains a non sequitur, a logical fallacy which equates an employee self-employment tax with an employer excise tax. (Cf. Aldisert, Logic for Lawyers, p. 198 (1990).) And, besides it is manifestly unfair to shift a tax imposed upon the employer for the employee's benefit onto the employee as the employee's liability.

Finally, the Court of Appeal, in disposing of the I.R.S.'s letter, holds that "[the letter] did not relieve [Cleary] of his duty either to pay income taxes as a self-employed individual or insist on being paid with proper withholding during the period he was employed by [Wasserwald]." (Append. p. 12). This is what Judge

Aldisert terms ignoratio elenchi (ignorance of the question) because even if Wasserwald had withheld Cleary's income tax, it would still have left Wasserwald personally liable for the employer's excise tax, over which Cleary could have no control and which by its nature is not withheld. It is this excise tax that Wasserwald seeks to evade by employing the device of independent contractor, a tax no amount of acquiescence can alter, and which tax he perversely converts from an employee benefit into an employee liability. If Zoe Baird, the beleaguered nominee for attorney general, must pay this tax, why should not Wasserwald.

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II.

Almost egregious as the above, which in truth prompted the action, is the Court of Appeal's disposition of the remaining counts of the complaint, the dismissal of which it affirms. In conformity with state law, Cleary pleaded additional causes of action for negligent infliction of mental distress and breach of the covenant of good faith and fair dealing, implied by state law in every contract, and for punitive damages.

Cleary alleged that he came to California from New Jersey where he had practiced law for 10 years. After passing the California Bar, he was hired in 1982 as an associate by respondent, who had a large plaintiff's personal injury practice employing well over 25 employees. Cleary, who had been previously hospitalized for mental and emotional problems, was nonetheless hired by Wasserwald, who also holds a psychology degree from U.C.L.A., at

the annual salary of $18,000. Wasserwald learned of these earlier breakdowns, and, indeed, Cleary was hospitalized for one during the early years of employment and about which Wasserwald also knew. The complaint continued that Wasserwald, over the course of Cleary's 7 year tenure with him, hired over 10 attorneys all at significantly higher salaries ($40,000, the entry level for Los Angeles, and higher). None of these attorneys stayed with Wasserwald more than a matter of months, except for Wasserwald's partner, Alvin Boatner, who was later disbarred. (In fact, two other associates from this period, Larry Cheshier and Mark Krueger both resigned with prejudice from the bar with charges pending.) Concerned about the "revolving door" nature of the employment, Cleary inquired about his status and Wasserwald assured him that he "could stay as long as you want."

Additionally, Wasserwald hired high school graduates as "adjusters," whom he paid more than Cleary. Indeed, he hired at least two disbarred lawyers, placed them in authority over Cleary, and paid them both significantly larger salaries.

Towards the end of the employment (December 1989), Cleary began to experience bouts of depression and demoralization which negatively affected his job performance, at least in Wasserwald's eyes. Wasserwald commenced a prolonged period of daily harassment, public berating, baiting, technical battery, the requiring of doctor's letters, the requiring of attendance at the office without being paid, and, despite obvious disability, the requiring of written assignments which, unilaterally, he paid by the piece, some days paying nothing. Promises of raises never materialized and Cleary made less in his last year than in his first, 7 years earlier.

Finally, Wasserwald fired Cleary in December 1989, and when Cleary applied for state disability and unemployment benefits they were denied because Wasserwald carried Cleary as an independent contractor, not an employee. For similar reasons, Cleary did not file a worker's compensation claim, knowing that there was no insurance for him. This is all in violation of applicable state statutes.

About 11 months later, however, to avoid the running of California's one year statute for personal injuries, Cleary filed this action against Wasserwald on November 21, 1990. (Append. p.50). The case was specially assigned to a judge who recused himself because he knew Wasserwald's wife, Hon. Florence Picard, Superior Court of California. The case was then transferred to another judge, who, after Wasserwald's default had been taken (set aside upon stipulation when the judge said he would set

aside if there was no stipulation), entertained two demurrers and motions to strike, after which the complaint was dismissed with prejudice.

The Court of Appeal affirmed in an opinion where it noted that Cleary acquiesced in his independent contractor status, barring his claim for indemnity for federal taxes. It then held, however, that the claim for personal injury was barred by the exclusive remedy provisions of the worker's compensation law, coverage afforded only employees under the statute.

The court held that Cleary was paid what he was worth, that values are set by the marketplace, that Cleary should have quit, and that Wasserwald had no obligation to make Cleary "feel good" by paying any particular salary - "as a matter of law." Finally, the court held that the tort remedies for breach of the covenant of good faith and fair dealing were no longer

available, only contractual remedies where the complaint "rises to the level of a violation of public policy," which allegations about rate and manner of pay, insurance coverage and discharge do not raise. The court opined that it cannot interject itself into the employment relation. The court held that as there was no theory for breach of contract (there was), plaintiff had failed to state a cause of action and the complaint was properly dismissed, leaving petitioner without remedy. (Append. p.18.)

As noted above, the California Supreme Court denied the petition for review of the Court of Appeal's decision on April 14, 1993. (Append. p.20.)

Reasons To Grant The Writ

I.

Misclassification Of Employees As Independent Contractors Costs The Federal Government $20 Billion A Year

The sum here is small, but the proportions of the problem are immense.

> In an era of large federal budget deficits, the Internal Revenue Service (IRS) has increased its efforts to plug leaks in the tax system. One of the largest perceived leaks is the misclassification of workers as independent contractors. The revenue loss to the federal government has been projected to be as high as $20 billion per year.

On July 22, 1992, the Joint Committee of Taxation issued

a report[1] on misclassification of independent contractors. That report cited to an IRS survey of employment tax returns which found that 15 percent of employers misclassified employees as independent contractors. The IRS survey also found that employees reported more than 99 percent of their wages when they were classified as employees, but reported only 77 percent of their wages when they were classified as independent contractors. The survey found that workers who were

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[1]Joint Committee on Taxation Staff Discussion (JCX-27-92) of Present Law and Issues Relating To Misclassification of Employees and Independent Contractors, House Ways and Means Subcommittee on Select Revenue Measures Hearing, reprinted in Daily Tax Report (BNA), No. 152, L-20, July 23, 1992

> classified as independent contractors and who did not receive a Form 1099 only 29 percent of their wages. (Emphasis supplied) Pace, "Employees or Independent Contractors-Tax Consequences of Misclassifying Workers As Independent Contractors," Los Angeles Lawyer, p.17, (May 1993).

The recent confirmation process for attorney general highlighted the problem and the seriousness with which it is regarded by the public. First Zoe Baird and then Judge Kimba Wood had to withdraw from the nomination process for attorney general when it was learned that they both employed illegal immigrants as domestics for which they only belatedly paid employer taxes, after first having classified the employees as independent contractors. Now Stephen

Breyer, putative nominee to fill Justice White's seat on this Court, was disqualified when it was learned that he had not paid social security taxes for his employee. Whether these belated payments were at the suit of employees or at the instance of the IRS did not appear. But, it seems clear, judging from the public outcry which forced Ms. Baird's withdrawal, that the public feels it is both a wrong and a widespread practice to misclassify employees as independent contractors, and their concern is amply documented by the study, supra. A clearer case of a substantial federal question, one for which special and important reasons exist to review the case, would be hard to imagine. (U.S. Supreme Court, Rule 10.1.)

To understand the public's concern it is only necessary to recall that Social Security retirement and disability payments (SSI) are pegged to the amounts paid into

each taxpayer's account. This amount determines the monthly benefit. Even where an employee misclassified as an independent contractor pays the employee share of taxes, the employee suffers nonetheless a proportionate diminution of his interest in the Social Security account by one-half, because the employer evades, successfully, the employer contribution equal to the amount paid by the employee (7.5% or slightly more) mandated by I.R.C. Section 3111(a), Old Age, Survivors and Disability Insurance. This is an excise tax, imposed as a cost of doing business, and it is particularly galling to have it shifted to the employee in the form of a self-employment tax.

The public outcry, then, can be seen for what it is: a protest at being cheated out of insurance for their most worrisome concerns, disability and retirement. The current estimate of $20 billion lost a year

attests to the pervasiveness of the practice. Yet the Court of Appeal has the temerity to say it is the public's loss due to its "acquiescence," misunderstanding the nature of the tax as a withholding tax rather than as an excise tax, not withheld, but paid directly by the employer from separate funds, as if to say the public is in pari delicto. The truth is, of course, that the public, this lawyer included, is ignorant of tax law, a recognized legal specialty, and it relies upon the employer's honesty to treat them fairly. The public outrage at the Zoe Baird hearing was due to their betrayal, the prevalent feeling being that no one can be trusted. This Court can restore a measure of that trust.

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II.

The Americans With Disabilities Act Applies To Cases Pending On Its Effective Date Where The Gist of the Action Alleges a Violation Of The Act

a.

The Act Preempts State Tort Law, Is Remedial, And Must Be Liberally Construed

From what has been said above, the Court can easily see that the case here involves a claim that a disabled person was exploited for seven years by his employer, a psychologist (as well as a lawyer). Disparity of pay, promotion, denial of raises, denial of statutory benefits (worker's compensation, state disability and unemployment insurance), improper working

conditions (making petitioner subject to disbarred attorneys) were all factors in what was termed below, "wrongful employment." This employment occurred in a larger context of unethical mismanagement for which respondent was suspended from the practice of law until he passes an ethics exam and completes courses in law practice management. The order of suspension reciting the details of some, but only some, of respondent's offensive behavior was made part of the record below and was before the Court of Appeal, which made no mention of it. To this date, the suspension has not yet been lifted. (Respondent has taken but failed the ethics exam.) And additional charges are pending before the State Bar. (None by petitioner.) This information was submitted under a state law requirement that proof that the claim for emotional distress, which has no elements, is "genuine."

i.

The ADA's Preemption

42 U.S.C 12101, et seq.

Needless to say, there are no reported cases discussing the Americans With Disabilities Act, at least at this writing, as it took effect on July 26, 1992, 24 months after its enactment. Pub. L.101-336, Title I, Section 108, 104 Stat. 337, set out as a Statutory Note to 42 U.S.C. Section 12112. (This raises a separate problem, treated below.) That is, the Act was effective when the Court of Appeal rendered its decision here on January 29, 1993.

The Equal Opportunity Commission (EEOC) is responsible for the enforcement of the ADA. 42 U.S.C. Section 12116. Pursuant to Section 12116, the EEOC was directed to issue regulations implementing the Act no

later than July 26, 1991, or 1 year before the Act's "effective" sate, i.e., parts of the Act were effective upon enactment despite the Act's statement that it takes effect on July 26, 1992. (See also, Section 12117 which directs that coordinating regulations implementing the Act be issued jointly by the agencies specified "not later than 18 months after July 26, 1990." Clearly, the Act had a present effect when enacted.)

In conformity with Section 12116, the EEOC issued its regulations on July 26, 1991, effective July 26, 1992. 29 C.F.R., Ch. XIV, Section 1630, p. 395. Appended to the regulations was Interpretive Guidance issued by the EEOC. Id., at p. 404. This guidance states the ADA is a federal anti-discrimination law designed to remove barriers against disabled persons so that they enjoy the same employment opportunities as the non-disabled. "Like the Civil Rights

Act of 1964...the ADA seeks to ensure access to equal employment opportunities based on merit." Ibid.

The general rule is set forth by statute: "No covered entity [an employer of 25 or more employees] shall discriminate against a qualified individual with a disability because of the disability...in regard to the hiring, advancement or discharge of employees, employee compensation...and other terms, conditions, and privileges of employment." 42 U.S.C Section 12112(a); Section 12111(2),(5)(A). Disability means a person with a history of physical or mental impairment, which includes any mental or psychological disorder such as emotional or mental illness. 29 C.F.R. 1603.2(g)(2),(h)(2). The discrimination prohibited includes: hiring, upgrading, promotion, tenure, demotion, transfer, layoff, termination; rates of pay and change in compensation; organizational

structure and lines of progression; fringe benefits available by virtue of employment; and any other "term, condition or privilege of employment." 29 C.F.R. Section 1630.4(b),(c),(d),(f),(i). One of the main intents of the law is to ensure that people with a history of disability are not discriminated against, especially intending that employees with disabilities be accorded equal access to whatever health insurance coverage the employer provides to other employees. Interpretive Guidance, Appendix, 29 C.F.R. Section 1630.2 (K), p.409, and Section 1630.5, p. 416. The Act provides that it may be enforced by the person affected in a private action, in like fashion with the Civil Rights Act of 1964. 42 U.S.C. Section 12117(a); 42 U.S.C. Section 2000e-5(f)(1). This means that in a private action the disabled person may recover damages for lost wages, health care expenses, pain and suffering, and, in

extreme cases, a special sum of money to punish the employer. Mental Health Consumers in the Workplace, An ADA Handbook, pp.30-31 (Mental Health Law Project, 1101-15th St., N.W., Suite 1212, Washington, D.C. 20005, 202-467-5730, 1992 - an excellent topical summary of the law.)

It must be readily apparent that, at least facially, the Act applies to this case. But if that is so, then the Act pre-empts state law and it should have been applied sua sponte by the Court of Appeal.

The EEOC in its regulations states:

> ...(2) Relationship To Other Laws. This part does not invalidate or limit the remedies, rights and procedures of any federal law or law of any state...or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this part.

(Emphasis supplied.) 29 C.F.R. 1630.1(c)(2).

The clear, albeit negative, implication is that where, as here, the state law, tort included, provides less protection than the Act, state law is pre-empted and the Act applies to the exclusion of state law. Here, of course, the Court of Appeal holds that the very acts covered by the Act do not constitute a cause of action under state tort law. Hence, state law was pre-empted and the Act should have been applied, again sua sponte, as the law applying at the time of decision. Fisher v. City of Berkeley, 37 Cal.3d 644, 654, n.3 (1984), aff'd. 475 U.S. 260 (1986).

All doubt about a pre-emption is laid to rest by the EEOC's Interpretive Guidance.

The ADA does not pre-empt any

> federal law, or any state law, that grants individuals with disabilities protection greater than or equivalent to that provided by the ADA... [Para.] This...means that an individual with a disability could choose to pursue claims under...tort law...if the potential available remedies would be greater than those under the ADA and this part. 29 C.F.R. Section 1630, Appendix, p.406.

The very clear implication is that state tort law is pre-empted if it provides less protection, or, as here, none to a disabled person. The Act sets a minimum standard of protection below which the states may not fall.

Hence, it follows that this Act should have been applied, sua sponte, before

the dismissal was affirmed. This is an important question which must be settled by this Court. After all, the standard in reviewing demurrers, even under state law, is that all the material allegations of the complaint are deemed true without regard to plaintiff's ability to prove them at trial. A demurrer cannot be used to screen a claim for emotional distress. The legal theory pled is not itself determinative so long as facts are pleaded showing that plaintiff may be entitled to some relief. Molien v. Kaiser Foundation Hospitals, 27 Cal.3d 916 (1980), at 919, 930. Thus the failure to label the action should not defeat it if the facts alleged show the right to some relief.

The argument here is independent of the argument which follows, about the Act's retroactive effect. To our knowledge this Court has not considered the question of retroactivity where the law in question pre-empts state law. We argue the pre-emption

in itself, effective on July 26, 1992, required the state court to apply federal law at the time it decided this case in January 1993, as that was Congress' clear intent. Thus, formally considered, there was no applicable state law in effect when the case was decided. Pre-emption is conceptually apart from the issue of retroactivity, discussed infra.

ii.

The ADA Is

Retroactive

The Court is asked here to revisit and decide when an act of Congress is prospective or retroactive. This Court noted in Kaiser Aluminum & Chemical Co. v. Bonjorno, 494 U.S. 827 (1990) that its own views of the applicability of enactments are in "apparent tension." Id., at 837. In

Bradley v. Richmond School Board, 416 U.S. 696 (1974), this Court held:

> [A] court is to apply the law in effect at the time it renders its decision...[E]ven where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect... [W]e must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature. Id., at 711, 715.

But in a later case this Court held, without citing Bradley, supra, that "retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed

to have a retroactive effect unless their language requires this result." Brown v. Georgetown University Hospital 488 U.S. 204, 208 (1988).

It has already been pointed out above that parts of the ADA were effective upon enactment as they called for regulations to be issued within 12 and 18 months of passage, respectively. 42 U.S.C. Section 12116, 12117(b). Hence the note that the Act is effective two years after enactment (July 26, 1992) is not entirely so.

The picture becomes complex with the passage of the Civil Rights Act of 1991 which purported to amend the ADA at 42 U.S.C. Section 12111, and Section 12112. The civil rights amendments, however, explicitly provided, in two separate sections, that the amendments were not to be construed to have retroactive effect: in the case of Section 109(c), not before the date

of enactment (1991); and, in the case of Section 402(b)(the Ward's Cove Amendment) not to any disparate impact case filed before March 1, 1975 and for which an initial decision was rendered after October 1, 1983. (Based upon these sections the 9th Circuit has held that the 1991 amendments show that the other provisions of the Civil Rights Act applies to pending cases. But the 5,7, and 8 circuits took the opposite view. Davis v. San Francisco, 976 F.2d 1536 (9 Cir. 1992), at pp. 1551, 1552, 1553.)

The argument is, succinctly, that as the Civil Rights Amendments (effective upon passage in 1991) amended the ADA, (otherwise not to take effect until July 26, 1992) but specifically stated that they were not to be applied retroactively in two enumerated instances, the remainder of the ADA was intended to apply to pending cases, and, possibly, to prior conduct as well. What remains prospective upon the effective date

in 1992 was only the EEOC's administrative regulations and their enforcement. The private cause of action to enforce the ADA created by Section 12117, as it incorporates the procedure of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(1), clearly shows Congress's intent that the ADA apply to pending cases on its effective date. To hold otherwise would render the 1991 amendments surplusage, as they would merely restate, as if for emphasis, that the Act, otherwise not retroactive, was definitely not retroactive in the instances cited. But as the 9th Circuit pointed out, this would run afoul of what this Court has repeatedly stated to be the "'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." (Cits. omitted.) Davis, supra, 976 F.2d, at 1551. But holding that the 1991 amendments merely confirmed the already prospective nature of the ADA would

do just that. Hence, we must assume, as Congress held its 1991 amendments to the 1990 ADA non-retroactive in only two specific instances, that the remainder of the unamended ADA was to have retroactive effect upon its effective date, one year later.

This raises an important question which this Court can alone resolve, as the circuits are divided. But if the ADA applies on its effective date to pending cases the gist of which allege a statutory violation, then clearly, here, the dismissal, and the reasoning in support of it, were erroneous. We add that the argument above about pre-emption is a strong reason, additionally, to believe that Congress intended the ADA to have a retroactive effect.

As the Davis court concluded:

> We would rob sections 109(c) and 402(b) of all purpose were we to

hold that the rest of the Act does not apply to pre-Act conduct. There would have been no need for Congress to provide that the Act does not pertain to the pre-passage activities of the Ward's Cove Company, see Section 402(b), or of American Businesses Operating Overseas, see Section 109(c), if it had not viewed the Act as otherwise applying to such conduct. Congress's express declaration that the Act is to operate only with prospective force in two instances thus provides a clear indication of its intent that the rest of the Act... apply to cases pending at the time of enactment and to prior conduct not barred by the applicable statutes of limitations. Davis, supra 976 F.2d, at 1551.

III.

The ADA Sets A Public Policy Which State Courts Must Recognize In Ruling On State Causes Of Action

a.

Federal Law Sets Public Policy For The States

It has already been pointed out above that the clear intent of the ADA was to pre-empt state law where that law provides remedies unequal to or less than those contemplated in the Act. Again, the Act was enacted on July 26, 1990, effective July 26, 1992. It, therefore, clearly applies to an appellate decision rendered in January 1993 as even under state law the court must apply the law in effect at the time of its decision whether or not raised by the parties. Fisher v. City of Berkeley, 37 Cal.3d 644, 654, n.3 (1984), aff'd. 475

U.S. 260 (1986). Of course, this court is not bound by state law in deciding whether intervening federal law must be applied by the states, clearly a federal question. See II, supra, where this issue is more fully discussed. That state law here does not meet ADA standards is clear as the plaintiff has been denied all remedies.

i.

Wrongful Termination

Under California law, there are three ways to plead a cause of action for wrongful termination, one in tort and two in contract. The tort cause of action arises, ex delicto, from the contract but is based on public policy, usually, though not necessarily, found in a statute. The second cause of action is based on an implied-in-

fact contract whereby by the language, course of dealings, and conduct of the parties an employment at will is transformed into a contract for an indefinite term. The third cause of action is based upon the breach of the implied covenant of good faith and fair dealing which circumscribes the employer's right to discharge an employee. Originally sounding in tort, for which appropriate damages were awarded, this third cause of action has since been limited to contractual remedies, absent contrary legislative direction. Foley v. Interactive Data Corp., 47 Cal.3d 654, 696, relied upon by the Court below. Appendix, p.17. ("...[A]ppellant's discharge... [and] respondent's allegedly tortious violation of their promises... [about] rate and manner of pay, insurance coverage and discharge...do not rise to the level of violation of public policy... Thus, appellant cannot maintain his claim of a tortious breach of the

implied covenant of good faith and fair dealing." Ibid.)

The issue presented, then, is whether petitioner was denied Due Process of law and its Equal Protection when the state court failed or refused to consider the ADA and the policy qua policy it embodies as a basis for stating a cause of action under state law.

There is, in the first instance, every reason to believe that even under state law the Court of Appeal erred as the California Supreme Court in Foley states, "The employee may sue in tort for discharges based on breaches of public policy." Id., 47 Cal.3d, at 693, n. 30. In deciding what the policy is, Foley clearly has Congress in mind. "The large body of law restricting an employer's right to discharge based on discriminatory reasons...indicates that the legislature and Congress have recognized the importance of the employment relationship

and the necessity for vindication of certain legislatively and constitutionally established public policies in the employment context. The Tameny cause of action [tortious discharge in violation of public policy] likewise is responsive to similar public concerns." Id., 47 Cal.3d, at 693-694. So, it is plain that California intends that federal law be consulted in deciding whether there has been a tortious discharge in violation of public policy.

The question here is whether California must consider law, as it did not, despite its profession to the contrary. The focus here is slightly different from Point II, where it was argued that the ADA was retroactive so as to state a statutory cause of action. Here the question is whether the public policy embodied in the ADA applies to the States so that it must be considered by the States in deciding whether a state cause of action premised upon a breach of public

policy has been stated. In this context, the argument is that the ADA as policy is effective upon enactment, July 26, 1990, and though the discharge here occurred in 1989, the policy would clearly apply to cases filed after its enactment, here November 21, 1990, regardless of the Act's effective date (July 26, 1992) as statute. This is not unfair as statutes are passed as a consequence of public policy which to some extent must exist sometime prior to the passage of the law. The law then may be said to articulate the pre-existing policy. Yet, we know of no case so holding.

We ask here only that the case be remanded for the state court to consider whether the policy of the ADA should change the result under state law.

ii.

The State Court Denied Plaintiff Equal Protection And Due Process Under State Law

The court below tried to salve its conscience at dismissing plaintiff's complaint by saying that plaintiff has a remedy under the Worker's Compensation law. (This law too would be pre-empted by the ADA. Indeed the EEOC has held that no state has remedies equal to or greater than the ADA. N.69, p.36, ADA Handbook, supra.) But this is incorrect for several reasons. In the first place, the cause of action for mental distress inflicted upon an employee by an employer has been held to create an entire class of civil wrongs outside the worker's compensation system. Hentzel v. Singer Co., 133 Cal.App. 790 (1982), a case cited to the court but ignored in its opinion. Secondly, the complaint recited that plaintiff had sought state disability

and unemployment insurance, but was told he was ineligible because the employer did not pay into the state fund as he was carried as an independent contractor. As an independent contractor, there would, of course, be no worker's compensation insurance for petitioner. Third, of course, by the time the court decided the case the statute of limitations had run against a worker's compensation claim. The court effectively skirts this point. Fourth, the defendant effectively asserted, in a bold face contradiction, that plaintiff was an independent contractor for tax purposes but an employee for personal injury purposes, and, therefore, barred by the exclusive remedy provisions of the worker's compensation law. The Court of Appeal accepted this position; this is the very essence of bad faith and unfair dealing.

But, finally, California law provides an action at law for an employee

whose employer fails to "secure" payment of worker's compensation insurance, as respondent did here. Labor Code Section 3706. In such an action, as this was, "it is presumed that the injury to the employee was a direct result and grew out of the negligence of the employer, and the burden of proof is upon the employer, to rebut the presumption of negligence. It is not a defense to the employer that the employee was guilty of contributory negligence, or assumed the risk of the hazard complained of..." Labor Code Section 3708.

What the Court of Appeal did, however, despite respondent's burden of proof (respondent filed no brief on appeal), is that it found no negligence as a matter of law, holding that "[i]mposition of liability is inconceivable in this case." (Append.p. 15.) The court held that whether "'the tort of negligent infliction of mental distress... [exists] depends...upon a

weighing of policy considerations for and against imposition of liability.'" (Cites omitted.) Opinion, 10. But, again, the court did not weigh the policy of the ADA. In fact the court took the position directly contrary to the policy of the ADA holding, "[W]e conclude that respondents owed no duty to make appellant feel good by paying him as much as other employees at the law firm, or any particular salary at all, as a matter of law." (Append.p.16.) This is reminiscent of state court opinions prior to the passage of the Civil Rights Act of 1964. In fact, we already have seen that a primary concern of the ADA is discriminatory pay and where proved it constitutes a violation of public policy. "No covered entity shall discriminate against a qualified individual with a disability...in regard to...employee compensation..." 42 U.S.C. Section 12112(a), General Rule. So, again, at the very least, the state court should have considered the

policy embodied in the ADA in "a weighing of policy considerations for and against imposition of liability" under state law. (Append.p.15.)

In abolishing this Court's direct appeal jurisdiction and converting it to discretion alone, Congress assumed that the basis for a jurisdiction by appeal reflected an unjustifiable suspicion of state court action involving a federal question. But it was assumed in abolishing direct appeal from state courts that this Court would grant certiorari to review state court action which is suspect and which presents a public issue worthy of the Court's time. 28 U.S.C. Section 1257, Commentary to 1988 Revision by David D. Siegel.

This is such a case. In attitude, approach and tone the Court of Appeal has exhibited an indifference to the welfare of the persons embraced by the ADA. "The judicial system cannot interject itself

[into the employment situation]. The reasonableness of the salaries offered by employers is determined by the marketplace, not in the courtroom." (Append. p.16.) But interjecting the courts into the marketplace is exactly what the ADA is about, especially as to "terms, conditions and privilege of employment." 42 U.S.C. Section 12112, General Rule. It is precisely the ruthless efficiency of the marketplace that the ADA was intended to ameliorate. At the very least, California must consider this policy before it denies all relief.

Conclusion

Important reasons exist to grant this petition. The misclassification of employees as independent contractors deprives the government of $20 billion

annually, and deprives the employees of an equal amount of protection in employer excise tax contributions to social security. The recent public outcry about the employer's evasion of its responsibility shows the depth of the public's concern and the pervasiveness of the practice.

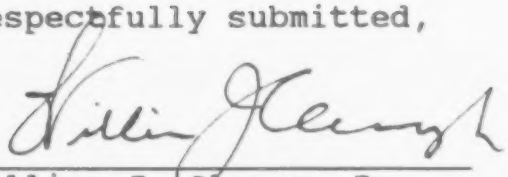
The Circuits are divided about when and whether the 1991 Civil Rights Act is retroactive, and, as the same act impacts the ADA by amendment, the division of opinion can be expected to implicate the ADA and to simply compound itself. This Court itself has recognized an apparent tension in its opinions about when an act of Congress is prospective or retroactive. This Court alone can resolve this tension.

The ADA has not yet been approached by this Court. It is landmark legislation equated with the Civil Rights Act of 1964 and meant to be remedial. The state courts are ignoring the Act in setting their

policies, and defeating the very people the ADA was meant to vindicate.

Date: June 16, 1993

Respectfully submitted,



William J. Cleary, Jr.